Supreme Court, U.S.
FILED
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No. ____

IN THE

Supreme Court of the United States

CARLOS SCOVENS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Fourth Amendment violated when an officer obtains a search warrant as a subterfuge to search for evidence of a crime for which the officer does not have probable cause and, when executing the warrant, flagrantly disregards its scope?

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties below.

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Petitioner, Carlo[illegible]vens, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit was issued on April 24, 2006. (App. 1a). The Order of the United States District Court for the District of Maryland was issued on June 14, 2005. (App. 3a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 24, 2006. (App. 1a). This petition is filed within 90 days of entry of judgment. Therefore, the jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 13.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On the evening of June 4, 2004, Baltimore County Police Department officers reported to the scene of a shooting at 5949-

A Sunset Avenue. (App. 4a; JA 30-31).[1] When Detective Ivory Bing arrived a little after 10:00 p.m., several other patrol officers and EMT personnel were already present. (JA 31). The shooting victim being attended to was Petitioner Carlos Scovens. (App. 4a).

The officers who initially arrived around 9:00 p.m. discovered Mr. Scovens in the front doorway of his home "suffering from multiple gunshot wounds to his person." (JA 52). Six empty bullet casings were found outside of the house on the front doorstep. (App. 4a). A window next to the front door had been shattered and the adjacent part of the doorway had three bullet holes. (App. 4a).

Inside the home, other bullet holes were discovered in a stairwell, just inside the front door. (App. 4a). Blood was also seen on the stairwell. (JA 36). When officers searched the front yard for additional evidence, they located a closed circuit television camera pointed at the front doorway area. (App. 4a).

Neither Mr. Scovens nor Terry Page, who was present at the scene of the shooting, was able to provide police with a description of the shooter. (JA 35, 38). Officers conducted interviews in the area and determined that "a large amount of pedestrian traffic is often witnessed traveling to and from that location throughout all hours of the day." (JA 53). A records check disclosed that Mr. "Scovens had an extensive criminal record that included a heroin distribution conviction." (App. 4a).

At that time, no evidence was seized, although Detective Bing testified that evidence of the attempted murder could have

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[1] "JA" refers to the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit.

been seized. (JA 40). Rather, the officer determined that a search and seizure warrant would be obtained. (JA 37).

At 2:47 a.m. on June 5, 2004, Detective Bing applied for a search warrant with Judge Alexandra Williams of the District Court of Maryland for Baltimore County. (JA 38, 50). The affidavit set forth the above information and asked for a warrant to search for and seize "evidence pertaining to the Attempted Murder of Carlos Darryl Scovens." (App. 4a).

The warrant authorized the police to search for and seize: (1) handguns, bullets, and casings; (2) forensic evidence pertaining to the attempted murder of Mr. Scovens; (3) evidence of residency; (4) electronic equipment, including computers and cell phones; and (5) any and all locked and unlocked containers for any other evidence of attempted murder. (App. 4a-5a). Nothing in the warrant authorized officers to search for evidence of violations of the controlled dangerous substances laws. (JA 48-49).

Detective Bing nonetheless testified at the suppression hearing that the reason he sought a search warrant was his motivation to search for narcotics. (JA 39). In answer to the question whether a search for narcotics was "in your mind before you sought the warrant," the officer answered "Yes." (JA 39). Detective Bing also acknowledged that all of the items listed on the inventory were drug-related. (JA 40).

The search of Mr. Scovens's home began at 3:09 a.m. on June 5, 2004. (JA 58). Items seized from under the bed in the master bedroom included a Pyrex mixing bowl containing crack cocaine, a glass jar containing suspected crack cocaine, and a digital scale. (App. 5a). United States currency in the amount of $3,500.00 was found on top of a bedroom dresser. (App. 5a). One half hour after the drug evidence was found, two

video tapes were recovered from the bedroom. (App. 5a). In addition, two forks with suspected drug residue were found in the kitchen sink. (App. 5a).

Mr. Scovens moved to suppress the evidence seized under the search warrant. (JA 4). At the hearing held on the motion, counsel argued that the warrant lacked probable cause, that the warrant was a general search warrant, that the manner in which the search was conducted turned it into a general warrant, and that the good faith exception to the exclusionary rule did not apply. (JA 9). The district court denied the motion to suppress in a letter ruling dated June 14, 2005. (App. 3a-7a). Mr. Scovens entered a conditional guilty plea to the indictment before the Honorable William D. Quarles, Jr. on June 23, 2005. (JA 4).

On September 16, 2005, Judge Quarles sentenced Mr. Scovens to the custody of the Attorney General for 120 months on Count one. Mr. Scovens was placed on supervised release for three years. (JA 4). Mr. Scovens noted an appeal from this judgment on September 20, 2005. (JA 5, 70).

The United States Court of Appeals for the Fourth Circuit affirmed in a per curiam opinion "for the reasons stated by the district court in its order denying Scovens' motion to suppress." (App. 2a).

REASONS FOR GRANTING THE WRIT

This case presents an important and heretofore unresolved issue under the Fourth Amendment: where the police obtain a warrant under pretext and thereafter flagrantly disregard the scope of the warrant, does such action transform the warrant into an impermissible general warrant, and if so, is the remedy blanket suppression of all evidence seized or only that evidence

seized beyond the scope of the warrant. Although the subjective intentions of an officer generally are irrelevant for Fourth Amendment purposes, this Court has never dealt with the issue of pretext in the context of a search warrant application and execution. This Court has mentioned the "flagrant disregard" doctrine in passing, but has never expressly recognized or applied it. The lower courts are in conflict over the doctrine, with some courts recognizing and applying it, other courts recognizing it, but not applying it, and still other courts refusing to recognize it at all. With this case, the Court can resolve these conflicts and answer the very important Fourth Amendment search warrant issue.

I. The Decision Below Raises An Issue Not Resolved By Fourth Amendment Precedent of this Court.

The text of the Fourth Amendment requires that no warrant shall issue unless it "particularly describ[es] . . . the place to be searched, and the persons or things to be seized." The requirement under the Fourth Amendment that warrants particularly describe the place to be searched and the things to be seized prevents a general, exploratory search and prevents the police from obtaining an illegal "general warrant." *See Andresen v. Maryland*, 427 U.S. 463, 480 (1976); *Stanford v. Texas*, 379 U.S. 476, 481-85 (1965). A warrant that is sufficiently particularized also leaves nothing to the discretion of the officer executing the warrant. *See Marron v. United States*, 275 U.S. 192, 196 (1927).

In the 30 years since this Court's *Andresen* decision, however, it has become much easier for police to engage in exploratory searches. That is so for two reasons: (1) the Court has ruled that subjective intentions generally play no part in the determination of probable cause issues, at least with respect to

warrantless activity, *see Brigham City v. Stuart*, 126 S. Ct. 1943, 1948 (2006); *Whren v. United States*, 517 U.S. 806, 813 (1996); *Scott v. United States*, 436 U.S. 128, 138 (1978); and (2) the Court has ruled that inadvertence is not an element of lawful plain view seizures, *see Horton v. California*, 496 U.S. 128, 140 (1990). Thus, as in Petitioner's case, when officers use the warrant process pretextually and then rely on the plain view doctrine to permit seizure of items found on the premises, there is no express guidance from this Court on whether this type of activity is illegal under *Andresen* and *Marron,* or is permissible under *Whren* and *Horton*.

This Court hinted at the solution to the problem in *Waller v. Georgia*, 467 U.S. 39 (1984). There, the Court acknowledged that some lower courts had ruled that where officers "flagrantly disregarded" the scope of warrants and thereby "turned the warrants into impermissible general warrants," the remedy was suppression of all evidence seized. *Id.* at 43 n.3. The Court noted that items "unlawfully seized were suppressed," but that "there is certainly no requirement that lawfully seized evidence be suppressed as well." *Id.* This, of course, begs the question of whether the items seized in cases like Petitioner's were "unlawfully seized."

Save that cursory discussion in passing, this Court has never directly examined the issue. Now is the time to revisit the *Waller* footnote and resolve this important question. It is particularly crucial to do so now, given the intervening decisions in *Whren* and *Horton*, and given the confusion among the lower court decisions.

II. The Lower Courts Are in Conflict on Whether to Recognize and How to Apply the "Flagrant Disregard" Doctrine.

The lower courts treat the flagrant disregard doctrine in essentially three different ways. Some have acknowledged it and applied it to suppress evidence. Others seem to acknowledge it in theory, but do not apply it. Still others reject it entirely.

Illustrative of the first category is a decision of the Ninth Circuit authored by then Judge, now Justice, Kennedy. In *United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978), officers sought to obtain a warrant to search for evidence of a cocaine importation scheme, but were denied the warrant because the information presented to the magistrate was stale. *Id.* at 420. Undaunted, the officers went to a different magistrate and obtained a warrant to search the same home for evidence of marijuana, based upon entirely different facts. *Id.* Armed with this warrant, officers conducted a full scale search of the premises, and seized a large quantity of evidence relating to the cocaine scheme. *Id.* at 421. The Ninth Circuit ruled that all the evidence seized must be suppressed. *Id.* at 423.

The court in *Rettig* did not determine the search warrant to be a general one, because the things to be seized were sufficiently described. *Id.* at 423. Yet the conduct of the officers violated the Fourth Amendment when the court considered "both the purpose disclosed in the application ... and the manner of its execution." *Id.*

Another leading case on this point is *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988). In that case, officers obtained a warrant to search for illegal firearms, but also had information that the Medlin residence might contain stolen

property other than firearms. *Id.* at 1195. The officers searched for and seized 130 firearms, but also "seized some 667 items of property none of which were identified in the warrant authorizing the search." *Id.* at 1196. The court held that this seizure violated Medlin's Fourth Amendment rights and ruled that all evidence, including the firearms, must be suppressed. *Id.* at 1200. *See also United States v. Foster*, 100 F.3d 846, 848 (10th Cir. 1996) (where officers obtained a warrant to search for marijuana and illegal weapons, but also seized "videotapes containing footage of sexual acts involving Foster and his stepdaughter and footage of marijuana use"). Also following the *Medlin* and *Rettig* view is the state court holding in *State v. Johnson*, 605 So. 2d 545, 548 (Fla. App. 1992) ("the officers' flagrant disregard for the terms of the warrant requires us to conclude that the court's suppression of these items was proper").

Although *Rettig* and *Medlin* pre-date this Court's decisions in *Whren* and *Horton*, a very recent decision of the Fifth Circuit found a pretextual warrant invalid under circumstances similar to Petitioner's. In *United States v. Pope*, No. 04-51008, 2006 WL 1531545 (5th Cir., June 6, 2006), an officer obtained a warrant purportedly to search for evidence of a prescription drug operation while actually looking for evidence of a methamphetamine lab. *Id.* at *1. The subterfuge was used because the officer was lacking probable cause to obtain a warrant to search for evidence of the latter crime. *Id.* The Fifth Circuit ruled that because the officer misled the magistrate about the true purpose of the search, the magistrate could not "properly perform his gate-keeping function of making the probable cause determination." *Id.* at *6. Further, the court rejected the argument that *Whren* applied because of "the palpable distinction between pretextual vehicle searches and the searches of private residences pursuant to a judicially

authorized warrant, the kind of searches that lie at the core of the Fourth Amendment's protections." *Id.*

Other courts have mentioned the flagrant disregard doctrine, but have not seen fit to apply it. A decision by Judge, now Justice, Souter is typical of this view. A defendant in *State v. Valenzuela*, 536 A.2d 1252 (N.H. 1987), *cert. denied*, 485 U.S. 1008 (1988), claimed "that the police flagrantly disregarded the warrant's limitations on the objects of search and seizure, and thus proceeded from an initially lawful entry to a general search." *Id.* at 1266. The court recognized that in such cases, "the only appropriate remedy may be plenary suppression of all evidence seized." *Id.* at 1267. The court concluded, however, that there was no flagrant disregard under the facts of the case. *Id.*

Many federal courts of appeal have likewise acknowledged the doctrine in theory, but not found it to be justified under the facts of the cases confronting them. *See, e.g., United States v. Hill*, 322 F.3d 301, 307 (4th Cir.) ("violations of the warrant were not so flagrant as to require the exclusion of the lawfully seized evidence"), *cert. denied*, 540 U.S. 894 (2003); *United States v. Carpenter*, 317 F.3d 618, 624 (6th Cir. 2003) ("cannot be said that the officers here grossly exceeded the scope of the warrant"); *United States v. Shi Yan Liu*, 239 F.3d 138, 141 (2d Cir. 2000) ("actions bear none of the hallmarks of a general search"), *cert. denied*, 534 U.S. 816 (2001); *United States v. Decker*, 956 F.2d 773, 779 (8th Cir. 1992) ("officers here did not exceed the scope of the warrant in terms of the places to be searched, and the unlawfully seized items have been suppressed"); *United States v. Schandl*, 947 F.2d 462, 465 (11th Cir. 1991) ("the vast majority of the documents seized were within the scope of the warrants"), *cert. denied*, 504 U.S. 975 (1992).

Finally, at least one court refuses to apply the doctrine under any circumstances. Citing to *Waller*, the Court of Appeals of Maryland stated it has no place in the jurisprudence of search warrant challenges: "We are not persuaded to overlay the exclusionary rule of the Fourth Amendment with the 'flagrant disregard' concept. The Supreme Court has not seen fit to do so and neither do we." *Klingenstein v. State*, 624 A.2d 532, 537 (Md.), *cert. denied*, 510 U.S. 918 (1993). While this statement may misread *Waller*, it nonetheless illustrates the necessity of this Court's resolution of the matter.

III. There Was a Flagrant Disregard of the Dictates of the Fourth Amendment in Petitioner's Case.

Applying the flagrant disregard doctrine to Petitioner's case, there can be little doubt that the officer violated the Fourth Amendment. Initially, the record is undisputed here that the officer obtained the warrant under a pretext and subterfuge. The affidavit speaks only to probable cause to search for evidence of attempted murder, yet the officer freely admitted at the suppression hearing that he only sought evidence of drug activity. (JA 39). Second, the warrant sought and obtained was overbroad. The shooting of Petitioner occurred at the front door to his house. (JA 52). All of the evidence of the shooting, i.e., the blood, bullets, and casings, was located just inside the door and on the staircases. (JA 52). Yet the officers sought a warrant giving them authority to search "any and all locked and unlocked containers, all locked and unlocked suitcases, sheds, outbuildings, and any other area." (JA 48). The warrant also authorized the officers to search for and seize evidence of "occupancy, residency, and/or ownership of the premises." (JA 48). Finally, the warrant permitted the officers to seize all "electronic equipment including but not limited to computer hardware and peripherals." (JA 48). Given the circumstances

of the shooting, there was no need for such broad authority, either as to places to be searched or things to be seized. There was no probable cause to search everywhere in the home for anything in any container. Indeed, the relevant evidence had already been searched for and could have been seized before the warrant was obtained. (JA 40-41).

The warrant was also defective in its execution. The officers knew that evidence relating to the shooting was located in the vicinity of the front door. Yet the officers wanted to search for evidence of narcotics, for which they did not have probable cause, but which they hoped would be found in other parts of the house. (JA 39-40). There was no need to look under Petitioner's bed to satisfy the warrant. Rather, it served only to satisfy the officer's quest for evidence of drug activity for which he had no probable cause. Thus, the officer embarked on the very type of fishing expedition prohibited by the Fourth Amendment and calling for the extreme remedy of blanket suppression.

In light of the fact that the officers violated the Fourth Amendment by conducting a general search, any plain view argument the Government might mount must fail. "It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Horton v. California*, 496 U.S. at 136. Thus, where there is a scope violation of even a validly issued warrant, "the subsequent seizure is unconstitutional without more." *Id.* at 140.

Nor could it be argued that the good faith exception to the exclusionary rule of *United States v. Leon*, 468 U.S. 897 (1984), applies. *Leon* applies only where officers act in an objectively reasonable manner when they execute a search

warrant that is later found to be invalid. *Id.* at 908-13. As this Court pointed out in that case, however, the exception "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Id.* at 918 n.9. In cases such as the present one where officers improperly execute the warrant by flagrantly disregarding its terms, the good faith doctrine (like the plain view doctrine) simply does not apply.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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July, 2006

APPENDIX

APPENDIX A
UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-4971

UNITED STATES OF AMERICA
Plaintiff - Appellee
v.
CARLOS SCOVENS, a/k/a Lucky
Defendant - Appellant

Appeal from the United States District Court for the District of Maryland, at Baltimore. William D. Quarles, Jr., District Judge (CR-05-35-WDQ)

Submitted: April 20, 2006 Decided: April 24, 2006

Before MICHAEL, KING, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion

Fred Warren Bennett, Gary E. Bair, Bennett & Bair, LLP, Greenbelt, Maryland, for Appellant. Rod J. Rosenstein, United States Attorney, Philip S. Jackson, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Carlos Scovens pled guilty to possession with intent to distribute cocaine base pursuant to a conditional guilty plea, reserving the right to challenge the denial of his motion to suppress. On appeal, he contends that the warrant was overbroad and was executed in an unconstitutional manner. We have reviewed the record and the parties' briefs on appeal, and we find no reversible error. Accordingly, we affirm for the reasons stated by the district court in its order denying Scovens' motion to suppress. See United States v. Scovens, No. CR-05-35-WDQ (D. Md. June 14, 2005; entered June 15, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B
UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
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Re: *United States of America v. Carlos Scovens*
Criminal No. WDQ 05-035

Dear Counsel:

Pending is the defendant's Motion to Suppress Search Evidence. For the following reasons, the motion will be denied.

BACKGROUND

On June 4, 2004, police officers D. Burns and C. Young went to 5949A Sunset Avenue, Baltimore County, Maryland to investigate an "unknown trouble" report after gunshots had been heard in the vicinity. Search warrant affidavit ("Affidavit") at 2d unnumbered page. Upon their arrival, the police found defendant Carlos Scovens at the front door; he had sustained several gunshot wounds. *Id.* The officers found six spent shells outside the Scovens residence. *Id.* A window near the door had been shattered and the doorway contained three bullets holes. *Id.*

Officers who entered the residence to secure it and aid Scovens, found additional bullet holes and located several projectiles. *Id.* Officers also found a video camera trained on the front door. Affidavit at page before "Expertise" section. Scovens' neighbors informed the police of "a large amount of pedestrian traffic [at his home] throughout all hours of the day." *Id.* The officers also determined that Scovens had an extensive criminal record that included a heroin distribution conviction. *Id.*

Baltimore County Police Detective Ivery Bing and Officer Burns obtained a warrant to search 5949A Sunset Avenue for "evidence pertaining to the Attempted Murder of Carlos Darryl Scovens." Affidavit at 1. The warrant authorized the seizure of *inter alia*, electronic equipment, "including computer hardware and peripherals...for video evidence and telephone numbers." Warrant at 1. The warrant authorized the search of locked and unlocked containers, suitcases, and other places at

the residence. *Id.* Recovered during the search were a mixing bowl containing crack cocaine and digital scale (found under a bed in the master bedroom), $3,500.00 from atop a dresser in another bedroom, two forks with white powder residue from the kitchen sink, and two videotapes. Warrant Inventory.

At the suppression hearing, Detective Bing stated his belief that the drug evidence seized related to the motive for the shooting of Scovens.

DISCUSSION

Although the defendant has made much of the number of officers who responded to the "unknown trouble" call, there is no evidence that the police did anything other than perform a protective sweep of the scene of an attempted murder. Of course, the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid; the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). And although the officer here did not -- the police could have seized any evidence that was in plain view during the course of their legitimate emergency activities. *Id.*

Relying upon *U.S. v. McCall*, 740 F.2d 1331 (4th Cir. 1984), the defendant insists that probable cause had dissipated before the warrant was issued because officers had already conducted a complete search of the residence and had recovered all evidence relevant to the attempted murder. This assertion is factually incorrect: there was no search of the Scovens residence before the warrant was issued. Had there been, the drug evidence would most probably have been legally seized under the plain view doctrine.

The dissipation of probable cause- - staleness- is an issue when: (1) the facts alleged in the warrant, although sufficient when the warrant was issued, grow stale because of the government's delay in executing the warrant, or (2) the warrant itself is suspect because the information on which it rests is arguably too old to furnish "present" probable cause. *McCall*, 740 F.2d, supra, at 1336. Just as the more than 20 months period in *McCall* was an insufficient basis for quashing that warrant, probable cause had not dissipated in the search warrant obtained and executed on the night of the Scovens shooting.

Nor is the warrant impermissibly general. General warrants are prohibited by the Fourth Amendment. The problem posed by the general warrant is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. The Fourth Amendment addresses the problem by requiring a "particular description" of the place to be searched and the things to be seized. *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). The particularity of the warrant must be determined within the context of the crime under investigation. *Id.*, at 481-483. The search for motive evidence is a legitimate purpose for a search warrant. *Id.*, at 483. The likelihood that Scovens had been a victim in a drug-related murder attempt, made it reasonable for the police to assume that Scovens' drug records and possible computer-stored surveillance camera images could have identified Scovens' assailant.

The police are permitted to use common sense to assist in determining the scope of the search authorized by the warrant. *U.S. v Owens*, 848 F.2d 462, 466 (1988). They are permitted to make a good faith interpretation of the warrant in light of the information available to them at the time they acted. *Id.* The search authorized and conducted under the warrant was justified and cannot be described as a fishing expedition.

CONCLUSION

For the foregoing reasons, and the evident good faith of the police in the execution of the warrant, IT IS ORDERED that the Motion to Suppress Search Evidence BE, AND HEREBY IS, DENIED.

Despite its informality, this letter is an Order of the Court and the Clerk is directed to docket it accordingly.

Very truly yours,

____/s/_____
William D. Quarles, Jr.
United States District Judge

cc: Addressees
Court File-Original